No. 12443

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL J. SCHIROS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT CARL J. SCHIROS' OPENING BRIEF ON APPEAL.

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Jurisdictional Grounds of Appeal.

This is an appeal taken under Rule 37 of 18 U. S. C. A. 302, from an indictment in two counts against the defendant Carl J. Schiros, the first for possession of counterfeit bills and the second count for uttering the bills in violation of Section 472 of the Criminal Code and Practice Act, 18 U. S. C. A.. The jury brought in a verdict of guilty in both counts and the court sentenced the defendant for two years on each count to run concurrently.

Proceedings on the Trial.

The instructions are set out at pages 102 to 113 of the Transcript. A motion for new trial [Tr. 12] appeal was filed November 1949 [Tr. 11]. The new trial was denied.

The case was tried by introducing the testimony of an admitted wrongdoer before the defendant took the stand, and it is contended that no proper foundation was laid connecting defendant with the possession of the alleged counterfeited notes or uttering them, and the court erred in submitting the action to the jury before a proper *corpus delicti* was proven. John Wyatt, a witness for the Government [Tr. 14, 16, 18], speaking of his alleged conversation with the defendant about making money, it is contended that this did not even state facts to raise a suspicion of guilt of the defendant. He said there:

> "Q. What did you say? A. I don't know the exact words.
>
> Q. What else did he say about money? A. Nothing that I know of."

Page 21 of Transcript in a further conversation about money, when asked if some ten dollars in an envelope shown to him were part of those passed by him [Tr. 22], replied:

> "A. I don't whether they are the ones, they look like it."

Page 24 he stated how he and his wife cashed the bills until her arrest [p. 25] for so doing. His wife, Bonnie Ruth Wyatt [Tr. 38], stated that she had no conversation with the defendant but remembered that she had met him once at her house when a man named Joe when he wished

to see Miss Shaw brought him there. The defendant remembered meeting her there. He allowed the officers to search his house and no bills were found. He denied having had any bills or uttering any. His testimony is clear and lucid and set out on page 74 of the Transcript. When asked if he recognized John Wyatt from his picture while it was shown to him in an automobile, he stated that he did not, but when he met him personally he admitted that he had seen him before.

The testimony of Chester Morris, the bartender at the Whittier Cafe, a relative of witness John Wyatt, is given on page 81 of the Transcript, and that of Victor D. Cali, page 58; of George Snellback, page 74; Mary Gertrude Morris, waitress at the Whittier Cafe, page 54; Ruth Shope, cook at cafe, page 49, and John D. Didier, pages 44-47 (owner of cafe). These were all witnesses for the Government, Messrs. Cali and Snellback being officers of the Government.

Appellant contends that the court committed material fundamental errors in its charge to the jury. He charged the jury as if the case were a conspiracy case. His stating that the Wyatts were accomplices tended to give the jury the idea that the defendant was the one they were accomplices with, which would tend to convey the idea that the defendant was guilty. The court failed to fully explain the rear issues in the case as to the meaning of Section 472, Title 18, and also failed to fully enlighten the jury as to the effect of the presumption of innocence of the defendant and to advise the jury of the effect and bearing of such presumption upon the duty of the jury to acquit the defendant if with the weight of the presumption they were in doubt about the guilt of the defendant. These errors were such fundamental material jurisdictional errors

that no objection in giving the instructions was necessary for the defendant to avail himself of them and more specially are those on page 111 of Transcript reading: "In cases where two or more persons, etc.," proper to be given in a conspiracy case where after overt act of conspiracy is proven the acts of accomplices conspirators are admissible. They are not admissible in the case at bar unless the proof shows that the defendant aided and abetted in the commission of the alleged crime. (*Nebbelink v. U. S.*, 73 F. 2d 678.)

Also the instruction on page 112 reading:

> "In determining the question, you are to consider all the facts and circumstances in the case which touch the conduct of the defendant as well as the declarations and admissions if any."

This does not limit the application to facts or circumstances material to the issue involved nor does it consider the necessity of establishing a *corpus delicti* before defendant's admission would be admissible.

It is fundamentally misleading and under the doctrine of *Robertson v. U. S.*, 171 F. 2d 345, where it is said:

> "Where errors complained of were plain, and natural and probable influence of such errors on the jury was prejudicial and right of defendant to a fair and impartial verdict of the jury was substantially affected. Courts of Appeal would take notice of errors, though they were not brought to the trial court's attention. Federal Rules of Criminal Procedure, Rules 51, 52b, 18 U. S. C. A." (See also p. 36 (2-4).)

Likewise *People v. Dorland*, 2 Cal. 2d 243.

In *Strickland v. U. S.*, 155 F. 2d 167, it is said:

> "Where circumstantial evidence is relied upon to sustain a conviction, the inferences that may be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence."

Though it is a general rule that, unless a motion to direct a verdict was made, an appellate court will not consider the evidence in a criminal case, where there is not sufficient evidence to support conviction and error is apparent, then it becomes the duty of appellate court to reverse the judgment.

Likewise it is said in *Voght v. U. S.*, 156 F. 2d 308:

> "(6) *'Corpus delicti'* generally means that specific crime charged has actually been committed by some one."

Taken from Words & Phrases, *Corpus Delicti:*

> (P. 310): "An accused cannot be convicted on an extra judicial confession alone, but such confession must be coupled with evidence, circumstantial or otherwise, establishing the *'corpus delicti'* by which is meant proof of the fact that the crime in question has been committed by someone. McLemore v. State, 111 Ark. 457, 164 S. W. 119, 120."

> "(7) Extra judicial admissions, declarations or confessions of accused may be considered in connection with other independent evidence in determining whether the *corpus delicti* is sufficiently proved: 'Inclusive facts and circumstances tending *prima facie* to show the *corpus delicti* may be aided by the admissions or confessions of accused so as to satisfy the jury be-

> yond a reasonable doubt, and so support a conviction, although such facts and circumstances standing alone would not satisfy the jury of the existence of a *corpus delicti.*' Hill v. State, 207 Ala. 444, 93 So. 460, 462."

The next paragraph in the instructions where it uses the word "admission" is objectional for the same reason. Anyone might easily fail to recognize the picture of a person he had seen only once, especially when shown to him in the early evening in an automobile. The instruction also is open to the objection that it does not fully explain to the jury as to its relation to the charge and also because the defendant is presumed to be innocent until proven to be guilty and unless this presumption was overcome by reasonable evidence of guilt that it was the duty of the jury to find the defendant not guilty on the ground of reasonable doubt of guilt.

In view of the aforesaid statements of law and fact above set forth by denying the new trial appellant contends that by the judgment against him herein he has been deprived of his liberty in violation of his constitutional rights under the California Constitution, Article 1, and Amendment XIV of the United States Constitution, and also the constitutional rights were denied in making the judgments run concurrently, as it is contended under Section 472 of Title 18, U. S. C. A., possession includes utterance, and that the charge embraces only one alleged crime.

POINTS AND AUTHORITIES.

The Court Committed Jurisdictional Prejudicial Error on the Trial as Follows:

I.

In admitting declarations of the accomplices Wyatt against the defendant's actions made outside of defendant's presence. Such declarations are not admissible.

People v. White, 35 Cal. App. 2d 61.

Likewise:

Robertson v. U. S., 171 F. 2d 345;

Vogt v. U. S., 156 U. S. 108;

Nebbelink v. U. S., 73 F. 2d 678.

These last two cases hold that this Honorable Court may consider fundamental lack of jurisdiction at any time it appears, even when not objected to on the trial, doubtless following 12(b), 28 U. S. C. A., of the Federal Rules of Civil Procedure, following Section 723(c).

The corroborating evidence must tend to connect defendant with the crime.

People v. Shaw, 17 Cal. 2d 802;

People v. Braun, 31 Cal. App. 2d 593;

People v. Bender, 27 Cal. App. 2d 175.

To prove criminal intent more than mere suspicion is necessary.

People v. Lima, 25 Cal. 2d 573.

II.

The court erred in giving the instructions as above set forth herein.

III.

In sentencing the defendant concurrently as it is claimed possession and utterance are all one crime.

In *Price v. U. S.,* 53 App. Dec. 164, 289 Fed. 562, where it is said:

> "An indictment based on Penal Code sec. 151 Comp. St. 10321) and alleging that defendant had in his possession a counterfeit obligation and did then and there with intent to defraud utter the same as true and genuine, charges only a single offense." (See also p. 563.)

Likewise, *Swartz v. U. S.,* 160 F. 2d 718.

IV.

The failure of the trial judge to fully explain to the jury the charge has been held reversible error.

United States v. Max, 156 F. 2d 16, following

United States v. Noble, 155 F. 2d 315.

V.

Referring to the Wyatts as accessories was also error as it might be inferred the defendant was guilty.

United States v. Monroe, 164 F. 2d 471.

VI.

The failure of the court to instruct the jury about the effect of the presumption of innocence as to its verdict.

The court in *Blinn v. U. S.,* 68 F. 2d 484, 487, infers:

> "The failure of the court to inform the jury what was a presumption of innocence and it required an acquittal of the defendant unless his guilt was es-

tablished by sufficient evidence to carry it beyond the domain of reasonable doubt."

Likewise:

Dodson v. U. S., 23 F. 2d 401, 403;

Davis v. U. S., 160 U. S. 469.

And also referred to in *Strickland v. U. S.*, 155 F. 2d 167.

In *Blinn v. U. S.*, the court said:

"Presumption of innocence is conclusion drawn by law in favor of one brought to trial on criminal charge, and requires acquittal unless guilt is established by sufficient evidence."

VII.

The court erred in denying a new trial.

Prayer.

For the manifest prejudicial fundamental errors in the trial of this action it is respectively submitted that the verdict of the jury should be set aside and annulled and the order for judgment, the judgment and the commitment be annulled and a new trial had herein with costs of appeal to appellant and such other and further relief be granted as to the court may seem meet and proper.

Respectfully submitted,

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